UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

HEATHER BENNETT, WILLIAM BENNETT, ANN COLE-HATCHARD, LAUREEN CONNELLY, DONNA DELARM, JILL DONOVAN, JEAN FREER, STEFANIE GAUDELLI, ELEANOR GOLD, GRACE ENRIQUEZ, MARION LEAVEY, MARGARET MACKEY, DIANE REEVES, CHRISTINA SAGARIA, CAROL SCHULER, ANTOINETTE WHITE, DEBORAH WHITTAKER, and CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000 AFSCME, AFL-CIO, ROCKLAND COUNTY LOCAL 844, COUNTY OF ROCKLAND UNIT 8350,

Docket No. 7:17-CV-02573

Plaintiffs,

-against-

COUNTY OF ROCKLAND and KATHLEEN TOWER-BERNSTEIN, in her individual capacity,

Defendants.

----------X

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT, PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

THOMAS E. HUMBACH
COUNTY ATTORNEY
By: Larraine S. Feiden (LF7818)
Principal Assistant County Attorney
County of Rockland, Department of Law
11 New Hempstead Road, 3rd Floor
New City, New York 10956
(845) 638-5180
feidentl@co.rockland.ny.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Defendants, County of Rockland (hereinafter "County") and Kathleen Tower-Bernstein, in her individual capacity (hereinafter "Tower-Bernstein"), hereby submit this Memorandum of Law and Declaration in support of their motion for summary judgment dismissing all claims asserted by Plaintiffs, Ann Cole-Hatchard, Laureen Connelly, Donna Delarm, Jill Donovan, Jean Freer, Stefanie Gaudelli, Eleanor Gold, Grace Enriquez, Marion Leavey, Margaret Mackey, Diane Reeves, Christina Sagaria, Erica Salerno, Carol Schuler, Antoinette White, Deborah Whittaker (hereinafter collectively "Employee Plaintiffs")[1] and Civil Service Employees Association, Inc., Local 1000 AFSCME, AFL-CIO, Rockland County Local 844, County of Rockland Unit 8350 (hereinafter "CSEA") pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure. The facts underlying this motion are fully set forth in Defendants' Rule 56.1 Statement of Undisputed Facts. (St.)

PRELIMINARY STATEMENT

The Plaintiffs' claims against Defendants are not protected speech under the First and Fourteenth Amendments. Therefore, Defendants are entitled to judgment as a matter of law.

Employee Plaintiffs are employees of the Department of Probation for the County of Rockland. They claim that their required attendance at Tower-Bernstein's departmental meeting and a Memorandum of Warning prepared in response to their written "request for relief" to various county officials violated their freedom of speech and chilled their right to free speech. However, Plaintiffs claims must be dismissed as their alleged speech was made as part of their official duties. In addition, while Plaintiffs make a claim for retaliation, they site no adverse job action by Defendants toward any of the Plaintiff Employees other than they were required to attend a

[1] Former Plaintiffs Heather Bennet, William Bennett and Andrew Schwartz have stipulated to a discontinuance of their cases.

departmental meeting, for which they were compensated for their time, and received an *informal* Memorandum of Warning which has not been included in their personnel files.

Plaintiffs assert that in articulating their concerns regarding the relocation of the Department of Probation for the County of Rockland to county officials they were engaging in speech on a matter of public concern and Defendants had no adequate justification for treating them differently from any other member of the general public. Unfortunately, while Plaintiffs may have spoken on a topic of public concern they did not do so as private citizens, they did so as employees of the Department of Probation for the County of Rockland.

As employees of the Department of Probation, Employee Plaintiffs hold various job positions within the department and perform multiple job functions and duties related to the supervision of persons on probation. Their duties include, but are not limited to, gathering information and corresponding with various other municipal agencies, verification of the social and legal history of probationers, meeting with probationers at various times, drafting pre-sentencing investigation reports, testifying in Court, and day to day clerical duties, including but not limited to, file maintenance, mailings, answering phones and the taking of restitution payments. (Exhibit "1" collectively).

Employee Plaintiffs' June 9, 2016 letter (Exhibit "8") outlining various concerns over the relocation of the department of probation does not reflect an outcry by private citizens regarding a public issue, it is merely governmental employees looking to take their complaints up the chain of command. Plaintiff Employees made no effort in any way to inform the public of theirs concerns. Their June 9, 2016 letter was not disseminated to any local newspapers nor made available on social media. Plaintiff Employees did not even bother to send their "formal request to for relief" to any other publicly elected officials within the County Rockland other than those whom were

employed by the County of Rockland or who were directly associated with its management and would have some influence over county management and the County Executive.

Employee Plaintiffs letter was written to circumvent and go above the chain of command and advocate to those they felt had more authority than their departmental supervisor, Kathleen Tower-Bernstein, to influence the decision to relocate the department. Their June 9, 2016 letter clearly states that they felt that the proposed relocation would have a "detrimental effect on [their] ability to gather information and supporting documents from each other" whether it is between individuals within the department or other inter-county municipal agencies which Employee Plaintiffs claim are essential to perform their job duties. Their concerns regarding clerical issues, file maintenance, revenue collection, staffing, client supervision, receptionist costs, etc., are all departmental office work related issues for day to day operations within the department and are part-and-parcel of each one of their related job duties. In addition, while Employee Plaintiffs allege they are concerned about how safety will be implemented in the new proposed location, they used the June 9, 2016 letter as an opportunity to reiterate how unsatisfied they are with their current office safety and security (*Guadelli Tr.* P.18 L. 2-13; *Cole-Hatchard Tr.* P. 16-25, P. 24, L. 2-7; *Leavey Tr.* P. 16, L. 2-6, Exhibits "15", "13" and "11", respectively).

Employee Plaintiffs as employees of the County of Rockland and more specifically as employees of the department of probation function is to advocate on behalf of the specific population they serve, whether it is with assisting the individuals they supervise with compliance, victims with collecting restitution owed or working with the courts with respect to determinations on sentencings. So, while the June 9, 2016 letter touches on topics that the general public may have concerns about, Employee Plaintiffs really were just advocating for a specific population they serve as part of their employment duties with the County of Rockland.

Even if Plaintiffs' alleged speech was constitutionally protected, Plaintiffs claims of First and Fourteenth Amendment retaliation must be dismissed as Plaintiffs suffered no adverse employment action related to the alleged infringed speech. Tower-Bernstein's departmental meeting was held on multiple days and during business hours to accommodate various departmental staffing schedules to ensure that the staff was compensated for their time and the department meeting was a requirement for the entire probation department staff not just signatories to the June 9, 2016, letter to ensure that no one was singled out. Also, while Tower-Bernstein's *informal* Memorandum of Warning was prepared in response to the June 9, 2016 letter it was not signed for by any of the signatories of the letter and therefore not placed in any of their personnel files. (*Mackey Tr.* P. 26 L. 9-13; *Whittaker Tr.* P 18 L. 12-14) Exhibits 16 & 12, respectively). In addition, none of the Employee Plaintiffs alleged to have been terminated, demoted, reassigned to a new department, received a reduction in pay or even received a negative job evaluation. In fact, many of the Employee Plaintiffs even testified that that signatories of the June 9, 2016 letter have been promoted within the department (*Mackey Tr.* P. 7 L. 2-12, *Donovan Tr.* P. 12-17, Exhibits "16" & "20").

It is clearly within the scope of Tower-Bernstein's duties to manage day to day operations of the department and its staff, and part of that management is discussing situations arising related to employment issues (Exhibit "2"). The June 9, 2016 letter is clearly written to advocate on behalf of the duties that are part-and-parcel of Employee Plaintiffs employment duties for the department of probation and therefore Tower-Bernstein's *informal* memorandum of warning was completely appropriate and far from an adverse job action.

Therefore, Plaintiffs' claims must be dismissed as their alleged speech was made as part of their official duties. While the plaintiffs allege that Defendants retaliated against them, the facts belie their claims as no disciplinary action whatsoever was taken.

STANDARD OF REVIEW

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a court may grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Rodriguez v. N.Y.C.*, 2008 WL 420015 (E.D.N.Y. 2008).

However, where the non-moving party bears the burden of proof as to the particular issues, the moving party may satisfy his burden under Rule 56 by demonstrating an absence of evidence to support an essential element of the non-moving party's claim. *Binder v. Long Island Lighting Co.*,933 F.2d 187, 191 (2nd Cir. 1991).

Once the moving party has met its burden, the opposing party must do more than simply show there is some metaphysical doubt as to the material facts. *Rodriguez v. N.Y.C., supra.* The non-moving party must come forward with specific facts showing there is a genuine issue for trial. *Caldarola v. Calabrese,* 298 F.3d 156, 160 (2nd Cir. 2002). The mere existence of some alleged factual dispute between the parties, alone, will not defeat the properly supported motion for summary judgment. Id. Thus, the non-moving party may not rest upon mere conclusory allegations or denials, but must set forth concrete particulars showing that a trial is needed. Id.

STATEMENT OF FACTS

A full recitation of the relevant facts is set forth in the accompanying Statement of Facts pursuant to Local Rule 56.1.

LEGAL ARGUMENT

I. THE PLAINTIFFS CLAIMS UNDER SECTION 1983 MUST FAIL

Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights conferred elsewhere. 42 U.S.C. §1983. Here, the rights Plaintiffs attempt to implicate under Section 1983 are the right to freedom of speech, as secured under the First Amendment, the right to Equal Protection, as guaranteed under the Fourteenth Amendment, and the right to Due Process, also guaranteed under the Fourteenth Amendment.

To succeed on their claims under Section 1983, the Plaintiffs must establish an actual deprivation of their Constitutional rights. The courts are inclined to dismiss the Plaintiffs Complaint under Section 1983 where there are no facts upon which a court could find a constitutional violation. *Mitchell v. Kean*, 974 F.Supp 332. 338 (S.D.N.Y. 1997). Broad and conclusory statements do not constitute a claim under Section 1983. *Alfarao Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2nd Cir. 1987). As will be demonstrated, the Plaintiffs Complaint must be dismissed as a matter of law, since there is no evidence the County Defendants violated the Plaintiffs constitutional rights.

A. THE JUNE 9, 2016 LETTER FROM PLAINTIFF EMPLOYEES TO THE ROCKLAND COUNTY LEGISLATURE AND OTHER ELECTED OFFICIALS SEEKING "A FORMAL REQUEST FOR RELIEF" REGARDING THE RELOCATION OF THE DEPARTMENT OF PROBATION IS NOT PROTECTED SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS

The letter articulating the Plaintiff Employees objection to the proposed relocation falls squarely within the rule set forth in the seminal case *Garcetti v. Ceballos, 547* U.S. 410, 417, 126 S.Ct. 1951, 164 L.Ed. 2d 689 (2006). Pursuant to *Garcetti*, it is well established that "the First Amendment does not prohibit managerial discipline based on an employer's expression made pursuant to official responsibilities." *Garcetti*, Id. At 424.

While the Plaintiff Employees allege they wrote the June 9, 2016 letter as "private citizens" expressing public concerns including "the anticipated negative impact on the Department of Probation's ability to provide services to the public", the primary focus of the June 9, 2016 letter as well as their Amended Complaint are the speakers' beliefs that the proposed relocation would negatively impact departmental services to the detriment of those it directly services. Moreover, the Plaintiffs themselves have testified that they wrote the June 9, 2016 letter on behalf of the Department of Probation:

> Q. Because the letter opens with reference to the probation staff. So was this letter written on behalf of the probation department?
> A. I would say yes, it was about our concerns about moving.

Cole-Hatchard Tr. P.28, L. 9-15 (Exhibit "13").

When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. This is the case even when the subject matter of an employee's speech is a matter of public concern. *Ross v. Breslin*, 693 F.3d 300, 305 (2d. Cir 2012). Speech may be pursuant to a public employee's official job duties even though it is not required by, or included in the employee's job description or in response to a request by the employer. *Id.* Accordingly, the Court in *Matthews v. City of NY* held that "speech is not protected if it is "part and parcel of the employee's concerns about [their] ability to properly execute [their] duties." *Matthews v. City of NY*, 779 F.3d. 167, 173 (2d Cir. 2015) (See *Whittaker Tr.* P. 11 L. 2-14; Exhibit "12").

In the case at bar, Plaintiff Employees' objections to the proposed relocation are "part and parcel" of the concerns about proper execution of their duties and the proposed relocation site that they decided was remote, unsafe, dirty and difficult for their clients to access. All of the advocacy

in which the Plaintiff Employees engaged related directly to their responsibilities in the Department of Probation (See *Connelly Tr.* P18 L 3-25, P. 19 L2-13, *Guadelli Tr.* P. 12 L. 14-25, P.13 L. 2-3; *Cole-Hatchard tr.* P. 17, L. 17-25, P.18 L. 2-8; *DeLarm Tr.* P, 16 L. 19-25, P. 17 L. 2-24, Exhibits "14", "15", "13" and "18", respectively).

> A. Splitting the department, that really, we need to be part of the same department. I am the support unit and we lost our accountants so I'm also the accountant and I'm also backup for all my employees. We were eight and now we're three. So there's no way I would able to do this position and still help the people in New City. To split the department, I wouldn't be able to function. I collect all the money, I send all the money to the victims, I write all the cash sheets. I need to have this information available to me or **I can't do my job**.

Whittaker Tr. P. 11, L. 3-14 (Exhibit "12").

Plaintiff Employees contend that they were speaking in a private capacity when they raised their concerns beyond their immediate supervisors by writing to legislators and select elected officials. "[T]aking a complaint up the chain of command to find someone who will take it seriously, 'does not, without more, transform…. speech into protected speech made a private citizen." *Ross*, 693 F.3d at 307 (quoting *Anemone v. Metro. Transp. Auth, 629 F.2d 97, 116 (*2d Cir. 2011) (See *Cole-Hatchard Tr.* P. 19, L15-25, Exhibit "13"). "Even if private citizens can complain to [elected officials the same way Plaintiff Employees] did, it would not change [the] conclusion that [the] speech was made pursuant to [their] official duties, and therefore unprotected by the First Amendment. *Cohn v. Dep't. of Educ. of NY*, 697 Fed. Appx. 98, 99-100 (2d. Cir 2017).

Discovery has established that Plaintiff Employees were acting in their capacity as public employees and not as public citizens when they drafted their list of objections to the proposed Department of Probation site relocation, as Director Tower-Bernstein, their department head and supervisor, had requested on multiple occasions.

The inquiry into whether a public employee is speaking pursuant to his or her official duties is not susceptible to a bright line rule. Courts must examine the nature of the plaintiff's job responsibility, the nature of the speech and the relationship between the two. *Ross*, 693 F.3d at 306. In order to determine whether Plaintiff Employees speech was made pursuant to their ordinary responsibilities, the Court "must take a hard look at the context of the speech." *Decotiis v. Whittemore,* 635 F.3d 22, 32 (2011). Although, the First Circuit has emphasized that "no one contextual factor is dispositive," it has set forth a list of non-exclusive factors to guide courts in their evaluation. *Id.* Those factors include:

> whether an employee was commissioned or paid to make the speech in question; the subject matter of the speech; whether the speech was made up the chain of command; whether the employee spoke at her place of employment; whether the speech gave objective observers the impression that the employee represented the employer when she spoke (lending it "official significance"); whether the employee's speech derived from special knowledge obtained during the course of her employment; and whether there is a so called citizen analogue to the speech. *Id*. (internal citations omitted).

B. PLAINTIFFS FIRST AMENDMENT RETALIATION CLAIM MUST BE DISMISSED AS A MATTER OF LAW

A Plaintiff asserting a First Amendment retaliation claim under Section 1983 must establish (1) the speech addressed a matter of public concern, (2) the Plaintiff Employees suffered an adverse employment decision, and (3) a casual-connection exists between the speech and that adverse employment decision so it can be said that the speech was a motivating factor in the adverse employment action. *Morris v. Lindau, et al.,* 196 F.3d 102, 110 (2nd Cir. 1999); *Cioffi v. Averill Park Center School District BOE,* 444 F.3d 158 (2nd Cir. 2006). If a Plaintiff establishes these three factors, the burden shifts to the Defendant to come forward with a non-retaliatory reason for its actions. *Id.* Indeed, the Defendant has the opportunity to show it would have taken the same adverse employment action even in the absence of the protected conduct. *Mount Healthy City Sch. Dist. Bd. Of Educ. v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568 (1977).

When these well settled principles are applied to the facts of the case at bar, it is clear that Defendants are entitled to summary judgment as a matter of law because the Plaintiff Employees alleged speech is not afforded the protection of the First Amendment. Finally, the Plaintiffs have failed to establish an adverse job action.

1. The Plaintiffs Alleged Speech Is Not Constitutionally Protected

The First Amendment protects a public employee's speech when he/she speaks as a citizen addressing matter of public concern. *Pickering v. Board of Educ. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S. Ct. 563, 88 S.Ct. 1731 (1968). The question of whether an employee's speech addresses a matter of public concern is one of law, not fact. *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983).

In *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 1960 (2006), the Supreme Court confirmed that, "when a public employee makes statements pursuant to his official duties, the employee is not speaking as a citizen for First Amendment purposes, and the Constitution does not insulate the communications from employer discipline." See also, *Ruotolo v. City of New York*, 2006 WL 2033662 (S.D.N.Y. 2006), "When a public employee goes "to work and perform[s] the tasks [they are] paid to perform, that employee acts a government employee and [their] speech is not protected by the First Amendment."

Since Plaintiff Employees alleged speech was undertaken in the course of their employment, and was in fact, part of their official duties, it does not constitute speech afforded protection under the First Amendment.

In light of the foregoing, the Plaintiffs First Amendment retaliation claim must be dismissed as a matter of law.

2. The Plaintiffs Have Failed to Establish a Casual Connection

Even assuming the Plaintiff Employees could establish their speech was Constitutionally protected, their claim still must fail because there is no evidence which suggests an adverse employment action. In order to establish causation, Plaintiffs must show the protected speech "was a substantial motivating factor in the adverse employment action." *Morris v. Lindau, et al.*, 196 F.3d 102 (2nd Cir. 1999) (See *Mackey Tr*. P. 24 L. 19-25, P. 25 L. 2-10, P. 30 L. 20-25, P. 31 L. 2-4, Exhibit "16").

CONCLUSION

For all of the reasons set forth above, it is respectfully requested that the Court grant an order granting judgment as a matter of law in favor of the Defendants and dismissing Plaintiffs' Complaint with prejudice in its entirety and for such other relief as the Court may deem appropriate under the circumstances herein.

Dated: July 20, 2018
New City, New York

THOMAS E. HUMBACH
County Attorney
Attorney for Defendants,
COUNTY OF ROCKLAND and
KATHLEEN TOWER-BERNSTEIN,
in her individual capacity
11 New Hempstead Road
New City, New York 10956

By: /s/ Larraine S. Feiden
LARRAINE S. FEIDEN (LF7818)
Principal Assistant County Attorney